

STATE OF MICHIGAN
IN THE SUPREME COURT

PHOENIX INVESTMENT HOLDING
COMPANY, INC., a Michigan corporation,
WOODLAND EXCAVATING, LLC, a Michigan
limited liability company, and WILLACKER
HOMES, INC., a Michigan corporation

Plaintiffs/Appellants,

Docket No.: 126561

-vs-

Court of Appeals
Case No.: 246398

NOSAN & SILVERMAN HOMES, LLC,
SILVERMAN DEVELOPMENT COMPANY,
SILVERMAN HOMES, INC., SILVERMAN
CONSTRUCTION CO. and TOLL
BROTHERS, INC.

Oakland County Circuit
Court Case No. 01-035158-CK

Defendants/Appellees,

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PLAINTIFFS/APPELLANTS' BRIEF IN OPPOSITION TO
DEFENDANTS/APPELLEES' APPLICATION FOR LEAVE TO APPEAL

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FILED

AUG 09 2004

CORBIN R. DAVIS
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MICHIGAN SUPREME COURT

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COUNTER-STATEMENT OF JURISDICTION

On April 24, 2002, the Oakland County Circuit Court rendered an opinion from the bench in this breach of contract action granting Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(10) as to Counts I, II and IV of Plaintiffs' Complaint. Consistent with its opinion from the bench, on May 7, 2002, the trial court entered a Final Judgment and Order of Dismissal of these three counts, and granted Plaintiffs' Motion to Amend Count II of the Complaint.

On September 11, 2002, the trial court rendered an opinion from the bench granting Defendants' Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10) as to Count II of Plaintiffs' Amended Complaint. Plaintiffs voluntarily dismissed Count III of their Complaint on January 13, 2003, so that Plaintiffs could pursue an appeal of the lower court rulings with respect to Counts I, II and IV.

On January 30, 2003, Plaintiffs filed a Claim of Appeal from the trial court's opinions and Orders of Dismissal issued on May 7, 2002 and September 11, 2002. The Court of Appeals rendered an unpublished Opinion on April 20, 2004, affirming the trial court's Order granting summary disposition on Count I of Plaintiffs' Complaint. However, the Court of Appeals reversed the trial court's Order granting summary disposition on Counts II and IV and remanded the action for proceedings consistent with that Opinion.

Defendants filed a motion to reconsider the April 20, 2004, Opinion on May 10, 2004. The Court of Appeals entered an Order denying Defendants' motion for reconsideration on June 7, 2004.

This Court has jurisdiction to review by appeal a decision of the Court of Appeals pursuant to MCR 7.301(A)(2).

Defendants' Application does not satisfy any of the requirements set forth in MCR 7.302(B). Accordingly, leave to appeal should not be granted.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S ORDER GRANTING SUMMARY DISPOSITION ON COUNT IV OF PLAINTIFFS' COMPLAINT.

Court of Appeals says "yes."

Plaintiffs/Appellants say "yes."

Defendants/Appellees say "no."

2. WHETHER THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S ORDER GRANTING SUMMARY DISPOSITION ON COUNT II OF PLAINTIFFS' COMPLAINT.

Court of Appeals says "yes."

Plaintiffs/Appellants say "yes."

Defendants/Appellees say "no."

INTRODUCTION

In this breach of contract action, Plaintiffs/Appellants seek damages resulting from Defendants/Appellees Nosan & Silverman Homes, LLC's and Silverman Development Company's failure to exercise their option with respect to five lots in Phase II of Trotters Pointe Condominiums, a subdivision under development. Plaintiffs also seek damages resulting from Defendants Nosan & Silverman Homes, LLC's and Silverman Development Company's refusal to utilize Plaintiffs' excavation services pursuant to the 1997 Options Agreement, the Second Amendment to the 1997 Options Agreement, and a separate Excavation Contract with respect to 40 lots in Phase II and all lots in Phase III in the aforementioned subdivision. Lastly, Plaintiffs seek damages from Defendant/Appellee Toll Brothers, Inc. for failing to satisfy its guaranteed obligation to acquire five lots in Phase II of Trotters Pointe Subdivision.

The Court of Appeals affirmed the trial court's Order granting summary disposition regarding Count I of Plaintiffs' Complaint and reversed the trial court's Order granting summary disposition on Count II and Count IV of Plaintiffs' Complaint. In their Application, Defendants seek leave to appeal the Court of Appeals' disposition on Counts II and IV. As mentioned, the Court of Appeals denied Defendant's Motion for Reconsideration, which was essentially the same argument now offered in support of their Application for Leave to Appeal.

COUNTER-STATEMENT OF FACTS

I. The Relevant Contracts.

This is a breach of contract action involving several contracts and agreements between the parties.¹ Pursuant to paragraph 5 of the 1996 Options Agreement, on June 12, 1996, Defendant/Appellee Silverman Construction Company (hereinafter "Silverman Construction"), Plaintiff/Appellant Willacker Homes, Inc. (hereinafter "Willacker Homes") and Plaintiff/Appellant Woodland Excavating, LLC (hereinafter "Woodland") entered into a separate contract whereby Woodland would provide excavation, backfill, rough grade and final grade services to Silverman Construction for all sites in the Trotters Pointe development.² (See Excavation Contract, attached hereto as **Exhibit A**). Incorporated into the Excavation Contract, otherwise referred to as Subcontract Order S2925, are Attachments A, B and C, which detail certain contract qualifications, including a price structure for all excavation work and the scope of Woodland's work. The Excavation Contract and all attachments were executed by representatives of the subcontractor, Woodland and Silverman. Moreover, Subcontract Order S2925 and Attachments A, B and C were all prepared using standard Nosan & Silverman Homes, LLC contract forms and language. (See **Exhibit A**).

¹Plaintiffs rely on the Statement of Facts set forth in their Brief on Appeal and their Reply Brief. Nevertheless, a summary of facts pertinent to this Application is included herein.

²The parties entered into the 1996 Options Agreement on June 3, 1996. The 1996 Options Agreement provided Defendant/Appellee Nosan & Silverman Homes, LLC (hereinafter "Silverman") with the exclusive option to purchase from Plaintiff/Appellant Phoenix Investment Holding Company, Inc. (hereinafter "Phoenix") 101 building sites in Phase I of a development in Lyons Township known as Trotters Pointe, and 241 building sites in Phase II and Phase III of Trotters Pointe. (See 1996 Options Agreement, attached as Exhibit E to Plaintiffs/Appellants' Brief on Appeal).

Next, the 1997 Options Agreement provided at paragraph 5,

Purchaser [Silverman] agrees to enter into an Excavation Contract with Seller [Phoenix] (or Seller's designee) [Woodland] for basement excavations, installation of sewer and water leads, backfill, rough and finish grading, and trucking of soils for all Sites in the Condominium [all three phases of Trotters Pointe], subject to mutual agreement of [Phoenix] and [Silverman] on pricing (which should be competitive and customary for such work).

(1997 Options Agreement, attached hereto as **Exhibit B**, ¶ 5).³ The 1997 Options Agreement also contains a default provision (See id. at ¶ 11) and an entire agreement provision (See id. at ¶ 31), which Defendants relied upon in their Motions for Summary Disposition in the trial court.

As mentioned, the parties were already subject to the Excavation Contract, which covered the excavation work to be performed by Woodland for the duration of the "project," meaning all sites located in the three phases known as Trotters Pointe. (See Exhibit A). The term "project" is used interchangeably with the terms "the condominium" and "the overall property" and refers to all sites in the development. (See Exhibit B). Attachment B of the Excavation Contract indicates that the effective date of the contract is June 1, 1998, through the "duration of project." (See Exhibit A, Attachment B).

On or about August 4, 1999, Phoenix, Silverman, Silverman Development and Defendant/Appellee Toll Brothers, Inc. (hereinafter "Toll Brothers") entered into a

³Phoenix and Silverman entered into a second Options Agreement (hereinafter "1997 Options Agreement") on October 15, 1997, whereby Phoenix granted Silverman an exclusive option to purchase Phoenix's interest in all building sites located in Phase II and Phase III of Trotters Pointe. (See Exhibit B).

Second Amendment to Options Agreement (hereinafter "Second Amendment").⁴ (See Second Amendment to the Options Agreement, attached hereto as **Exhibit C**). Among other things, the purpose of the Second Amendment was to assign all rights and obligations under the 1997 Options Agreement, as amended, from Silverman to Silverman Development, and to require Silverman Development to exercise its options and acquire all units remaining in Phase II. (See **Exhibit C**, Recitals D). Like the 1997 Options Agreement, the Second Amendment provides that,

Silverman [Development] agrees to enter into an Excavation Contract with Seller [Phoenix] for basement excavations, installation of sewer and water leads, backfill, rough and finish grading and trucking of soils for all sites in Phase III of Trotters Pointe Condominium, subject to mutual agreement of Seller and Purchaser on pricing (which pricing shall be competitive and customary for such work).

(**Exhibit C**, ¶ 5).

Furthermore, the amended contract states,

3. The Options Agreement, as amended, is further amended to reflect the following:

* * *

E. Silverman [Development] hereby agrees to exercise its options and acquire all remaining Phase II Units in accordance with the terms and conditions of the Options Agreement, as amended.

F. Toll Brothers hereby agrees to guaranty the obligations of Silverman [Development] with regard to the acquisition of the remaining Phase II Units, in accordance with the terms and

⁴The 1997 Options Agreement was first amended in June 1998, and is more fully discussed in Plaintiffs' Brief on Appeal.

conditions of the Options Agreement, as amended.” (emphasis added)

(Exhibit C).

II. Defendants’ Breach of Contractual Obligations.

On October 20, 2000, Plaintiffs received notice that Silverman Development failed to purchase units 167, 168, 172, 173 and 180 in Phase II of Trotters Pointe pursuant to the 1997 Options Agreement, as amended. In addition, Silverman failed to abide by the separate Excavation Contract with Woodland with respect to 40 lots in Phase II and all lots in Phase III. Despite the contractual provision requiring Silverman to stay with Phoenix and the Excavation Contract already in place for the entire project with Woodland, Silverman entered into a new excavation contract with a third-party. (See Exhibit A, Attachment B and **Exhibit C**). Additionally, Toll Brothers failed to satisfy the obligations it made on behalf of Silverman Development with regard to acquisition of the remaining Phase II units.

ARGUMENT

Defendants claim that the Court of Appeals erred in reversing the trial court's Order granting summary disposition on Counts II and IV of Plaintiffs' Complaint.

In the Court of Appeals, it was Defendants' contention that "the case is not complicated" and that the Plaintiffs "hope to make this case seem more complicated than it is." (See Appellees' Brief, p 11.) Interestingly, in a complete reversal of the posture in the Court of Appeals, Defendants now complain: "Sophisticated parties, who draft and enter into such sophisticated agreements, are entitled to fair treatment from the Michigan courts." (Defendants' Application for Leave to Appeal, p 1). The Court of Appeals properly reversed the trial court's Order granting summary disposition on Counts II and IV of Plaintiffs' Complaint, thereby correcting the errors urged upon the trial court by Defendants. For the reasons set forth herein, Defendants' Application for Leave to Appeal should be denied and the matter remanded to the Oakland County Circuit Court for proper adjudication.

I. Standard of Review.

Pursuant to MCR 7.302(B)(5), an application for leave to appeal to the Supreme Court appealing from a Court of Appeals' decision must show that the "decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals." See also Bean v Directions Unlimited, Inc, 462 Mich 24, 34; 609 NW2d 567 (2000).

On appeal, an order granting or denying summary disposition is reviewed *de novo*. See Maiden v Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. See Spiek v Dept of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). If the evidence does not

establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Maiden, 461 Mich at 120. In evaluating a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. See MCR 2.116(G)(5). If the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

II. The Court of Appeals Properly Reversed the Trial Court's Order Granting Summary Disposition on Count IV of Plaintiffs' Complaint.

Defendants are critical of the Court of Appeals' Opinion holding that the trial court erred in granting summary disposition in favor of Toll Brothers on Count IV of Plaintiffs' Complaint. This issue stems entirely from Defendants urging the trial court to accept an erroneously broad application of the liquidated damages clause found in the 1997 Options Agreement. Defendants argue that Plaintiffs never raised the issue of Toll Brothers' liability as guarantor of Silverman Development under the terms of the Second Amendment. This is nonsense.

At the outset of Plaintiffs' Brief on Appeal with the Court of Appeals, at the "Statement of Questions Presented," Plaintiffs raised the issue of whether the trial court erred when it held that the liquidated damages clause contained in the default provision of 1997 Options Agreement was Plaintiffs' sole remedy, even though Defendant Toll Brothers breached its guaranty of the obligations of Silverman Development. The issue is thereafter raised throughout Plaintiffs' Brief on Appeal and specifically at pages 11 through 13, where Plaintiffs argued that the trial court erred in holding that the parties "intended the 1997 Options Agreement to remain the controlling instrument, even though it was partially amended."

Furthermore, Plaintiffs argued that the parties' responsibilities were modified through amendments to the 1997 Options Agreement and that Toll Brothers was added to the contractual relationship. As a result, Toll Brothers became a guarantor and incurred other contractual obligations. Plaintiffs consistently argued that Toll Brothers breached its contractual obligations under the terms of the Second Amendment. This was the entire basis for Count IV of Plaintiffs' Complaint.

The Court of Appeals concluded at page 3 of its Opinion, the trial court erred when it found that the default provision of the 1997 Options Agreement was a limitation on the remedies available to Plaintiffs as a result of Toll Brothers' breach. The Court of Appeals specifically held,

The plain language of the default remedy provision applies only the *purchaser's* failure to exercise the options and not the guarantor's failure to provide a guarantee. . . . Therefore, we conclude that a question of material fact remained regarding plaintiffs' right to separate damages for Defendant Toll Brothers' failure to guaranty, and the trial court improperly concluded that the liquidated damages provision was the appropriate remedy for the failure to guaranty.

(April 20, 2004 Opinion attached hereto as **Exhibit D**, at p 3).

Additionally, Plaintiffs noted in their Court of Appeals Reply Brief (at page 6) that Defendants completely ignored the issue of Toll Brothers' guaranty in its appeal brief. At that time, Plaintiffs reaffirmed their position on the application of the liquidated damages provision to Plaintiffs' claim against Toll Brothers.

In any event, Defendants cite Wallace Hardware, Inc v Abrams, 223 F3d 382, 401 (6th Cir 2000) in support of the argument that Toll Brothers, as guarantor, cannot have an obligation to Plaintiffs greater than the obligation to the principal debtor, Silverman

Development. However, Defendants' reliance on Wallace is misplaced in this case. The facts are easily distinguished and a discussion of guarantor liability in Wallace, on the whole, actually supports the Plaintiffs' position, as well as the Court of Appeals' Opinion that the Second Amendment and the 1997 Options Agreement were silent regarding the breach of guaranty provision after Toll Brothers became a guarantor under the provisions of the Second Amendment.

If Plaintiffs' remedies were limited to the liquidated damages provision set forth in Paragraph 11 of the 1997 Options Agreement, there would have been no need for Toll Brothers to guaranty the obligations of Silverman Development at all. Obviously, the parties intended that Toll Brothers would serve as a guarantor of Silverman Development's obligation to purchase the lots in accordance with the 1997 Options Agreement as amended. The contract must be construed as a whole, so as to give each of its provisions the meaning intended by the parties. Old Kent Bank v Sobczak, 243 Mich App 57, 63; 620 NW2d 663 (2000); Leon v Detroit Harvestore Co, 363 Mich 366; 109 NW2d 804 (1961).

Defendants do not dispute that Toll Brothers did not perform its contractual obligation. The contract unambiguously states that Toll Brothers intended to assume the obligations of Silverman Development and they failed to do so. Nevertheless, Defendants, in an effort to avoid their obligations, continue to argue that the Court should ignore the clear intent of the parties and that the Court of Appeals erred in construing the controlling contract language.

III. The Court of Appeals Properly Reversed the Trial Court's Order Granting Summary Disposition on Count II of Plaintiffs' Complaint.

Defendants' second argument appears to be yet another attempt to sweep Plaintiffs' claim for breach of the Excavation Contract set forth in Count II of their Complaint

under an overly broad interpretation of the liquidated damages provision in the 1997 Options Agreement. Defendants argue, again, that their refusal to abide by the terms of the Excavation Contract with Plaintiffs is a non-monetary default subject to the liquidated damage clause in the 1997 Options Agreement. This is the same argument that led the trial court to incorrectly decide that the breach of any excavation contract existing between the parties was guided by the default provision set forth in the 1997 Options Agreement.

Defendants argue that the Court of Appeals misunderstood the scope of the default provision at issue, and base their entire argument on the fact that the Court of Appeals, in its April 20, 2004, Opinion, only quoted the first portion of the default provision contained in the 1997 Options Agreement. On the contrary, the Court of Appeals correctly held, "The plain language of the default remedy provision only applied to the 'purchaser's' failure to exercise an option, and thus, the default remedy provision did not apply to a 'non-monetary failure,' or any other agreement or breach." (See Exhibit D, at 5). Defendants, on the other hand, assert that the Court should broadly interpret this provision in contradiction to the intent of the parties, which is what perpetuated the errors in the trial court.⁵ The Court of Appeals correctly addressed this issue and provided sound reasoning for their Opinion.

The default provision at issue specifically states,

Failure to Purchaser to: (a) exercise an Option with respect to a Site in the manner provided in this Agreement within ten (10) days after Seller has notified Purchaser that Purchaser has failed to exercise an Option as is required pursuant to Paragraph 3 hereof; or (b) comply with all other terms of this Agreement within thirty (30) days

⁵Incidentally, the strained public policy arguments espoused by Defendants are completely misguided.

after Seller has sent notice to Purchaser of nonmonetary failure (provided that if such failure cannot reasonably be cured within such thirty (30) day period, Purchaser shall have a reasonable period of time, not to exceed sixty (60) days from the date such notice is sent, to cure such failure, provided that Purchaser commences and diligently and continuously pursues such cure in the initial thirty (30) day period) shall extinguish Purchaser's right to all Sites not theretofore purchased and Purchaser's option in the Phase 3 Property pursuant to Paragraph 32, and all payments made hereunder shall be retained by and be the property of Seller as liquidated damages. Purchaser's right to cure defaults pursuant to this Paragraph shall expire, as to monetary defaults, thirty (30) days before the end of the Option Period and, as to non-monetary defaults, sixty (60) days before the expiration of the Option Period.

(**Exhibit B**, ¶ 11). The last sentence of the default provision refers to monetary and non-monetary defaults, but only as they relate to the option period set forth in the 1997 Options Agreement. As the evidence demonstrates and the Court of Appeals recognized, the parties entered into a separate Excavation Contract pursuant to Paragraph 5 of the 1997 Options Agreement and the Second Amendment. Accordingly, since the parties entered into a separate contract for services, the default provision set forth in the 1997 Options Agreement simply does not apply.

The 1997 Options Agreement and the Second Amendment do not contain any language providing that separate contracts between the parties are in any way subject to the default, or liquidated damages, provision at issue. In fact, the Excavation Contract contains language providing for remedies in case of default of the parties. Again, this is simply another attempt by Defendants to avoid their contractual obligations, as set forth

in the 1997 Options Agreement, the Second Amendment, and the separate Excavation Contract.

RELIEF REQUESTED

WHEREFORE, Plaintiffs/Appellants respectfully request that this Honorable Court deny Defendants/Appellees' Application for Leave to Appeal in its entirety and remand this matter to the Oakland County Circuit Court for further action consistent with the April 20, 2004, Opinion issued by the Court of Appeals.

Respectfully submitted,

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Dated: 8-9-04

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